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that of suretyship. A defense set up against the creditor based upon the absence of any liability of the principal debtor will therefore be heard only when it is substantial, and not when it is predicated upon technicalities which would defeat the cause of fair dealing.

ADMISSIBILITY IN EVIDENCE OF THE OPINION OF NON-EXPERTS.—It has frequently been said that opinion is not evidence, and the rules whereby lay opinion is admitted are called exceptions to the general doctrine. It is, of course, clear that where all the facts and circumstances of a particular transaction can be detailed to a jury in such a manner that they may be enabled to draw reliable deductions therefrom, there is no need for opinion evidence, and such testimony should be excluded. Experience has shown, however, that many cases exist in which it is impossible by any description, however graphic, to place the facts before the jury so as to enable anyone but the witness himself to see or comprehend them, as they would have been seen or comprehended could the jury have occupied his position of observation. Clearly in such a case, the witness's opinion, even though he be a layman, is of the greatest assistance to the jury, and his testimony should be admitted.¹ It is this same principle of assistance to the jury which underlies the admissibility of expert testimony; the aid of a witness of peculiar skill is in some instances necessary to enable the jury to make trustworthy deductions. Although in England the opinions of laymen have long been admitted in evidence with great freedom,² the question of the admission of such evidence has proved extremely vexatious to the courts of this country and has given rise to innumerable shadowy distinctions and technical refinements.

The most prominent class of cases in which the question arises is that in which the opinion of non-experts is offered to prove sanity or insanity. Although in a few jurisdictions a lay witness may give his opinion after having merely testified to his opportunity for observing the person whose mental capacity is in issue,³ the more general rule would seem to be that in order to render such evidence competent the witness must also lay before the jury the facts upon which his opinion is based.⁴ Some jurisdictions lay down the above limitation seemingly as a testimonial qualification,⁵ while others enforce it for the purpose of enabling the jury to decide intelligently how much weight should be given to the opinion introduced.⁶ Since it is manifestly impossible to detail accurately all the subtle facts and circumstances which give rise to an opinion of imbecility, it seems clear that the latter view

¹*Evans v. People* (1863) 12 Mich. 28, 35; *Bates v. Sharon* (1873) 45 Vt. 474.

²See *Evans v. Blood* (1746) 4 Bro. P. C. 557; *Rex v. Oxford* (1840) 9 C. & P. 525, 547; *Trelawney v. Colman* (1817) 2 Stark. N. P. 191. See also *Hardy v. Merrill* (1875) 50 N. H. 227.

³*Hardy v. Merrill supra*; see *Grand Lodge v. Wieting* (1897) 168 Ill. 408; *Grimshaw v. Kent* (1903) 67 Kan. 463; *Abbott v. Comm.* (1900) 107 Ky. 624.

⁴*State v. Smith* (1901) 106 La. 33; *Shaeffer v. State* (1895) 61 Ark. 241; *The Berry Will Case* (1901) 93 Md. 560, 580; *State v. Cross* (1900) 72 Conn. 722.

⁵*State v. Smith supra*; *Shaeffer v. State supra*; *Prentiss v. Bates* (1892) 93 Mich. 234, 242.

⁶*The Berry Will Case supra*.

should prevail, for to make the witness's testimonial qualification depend upon a detailed account of the facts upon which the opinion is based would frequently result in the exclusion of opinions which would be of very real assistance to the jury.⁷

The same rules, derived from the same sound basis of impossibility of accurately placing all the basic facts before the jury, apply also to the introduction in evidence of the impression which a witness received from a person's appearance, such as of anger, pain, intoxication and the like.⁸ Although no satisfactory distinction appears, it seems that a witness may not testify to his opinion of what was the intention of another, derived from observation of his actions,⁹ but the courts are divided on the question of whether he may testify to his opinion of the effect of the conversations and actions of others.¹⁰

In the recent case of *Pearce v. Stace* (N. Y. Ct. of App. 1913) 48 N. Y. L. J. No. 143, an action for breach of promise of marriage, a witness was asked whether, from his observations of the conduct of the plaintiff and the defendant, he was of the opinion that the "plaintiff was attached to the defendant." Such a question was held improper as calling for an incompetent opinion from the witness, and the court suggested that it was for the jury to draw inferences of attachment from the conduct of the parties as detailed to them. Although there is considerable authority for this position,¹¹ it seems difficult, in view of the principles already noted, to find justification for such a view. Conduct of parties denoting attachment or affection is obviously of a

⁷In this connection it is interesting to notice the somewhat extraordinary state of the law upon this subject in Alabama, Massachusetts and New York. In the jurisdiction first named the non-expert is seemingly permitted to give his opinion of *sanity* without stating the facts upon which it is based, while he may give an opinion of *insanity* only after a statement of such facts. *Caddell v. State* (1900) 129 Ala. 57. In Massachusetts the early cases seem to exclude without qualification all lay opinion. *Poole v. Richardson* (1807) 3 Mass. 330; *Townsend v. Pepperell* (1868) 99 Mass. 40. Later cases, however, while excluding opinion derived from observation of general conduct, *Smith v. Smith* (1892) 157 Mass. 389; *Ratigan v. Judge* (1902) 181 Mass. 572, permit the witness to testify that he "observed no incoherence in thought" and the like, on the theory that such an expression is really not an opinion as to the testator's state of mind at all, but an account of its manifestations as observed by the witness. *Nash v. Hunt* (1874) 116 Mass. 237, 251. In New York, after much vacillation, *DeWitt v. Barly* (1853) 9 N. Y. 371; (1858) 17 N. Y. 340, the courts have reached a position which somewhat resembles the Massachusetts view. The non-expert witness may detail certain actions to the jury and is permitted to characterize them as the actions of a rational or of an irrational man, but he may not give his opinion on the question of general rationality, though he derived it from the same actions. *Paine v. Aldrich* (1892) 133 N. Y. 544. No sufficient basis for these technical distinctions appears.

⁸*Miller v. State* (1894) 107 Ala. 40; *Choice v. State* (1860) 31 Ga. 424, 466; *Bizer v. Bizer* (1900) 110 Ia. 248; *Weiner v. Chi. & N. W. Ry. Co.* (1900) 105 Wis. 300; *Sherrill v. Telegraph Co.* (1895) 117 N. C. 352.

⁹*Gardner v. State* (1892) 90 Ga. 310; *Tucker v. State* (1899) 89 Md. 471; but see *People v. Ching Hing Chang* (1887) 74 Cal. 389, 394.

¹⁰*Fiske v. Gowing* (1881) 61 N. H. 431; *Fields v. Copeland* (1898) 121 Ala. 644.

¹¹*State v. Brown* (1892) 86 Ia. 121; *Leckey v. Blosser* (1855) 24 Pa. 401; *Carney v. State* (1885) 79 Ala. 17.

subtle and delicate nature and plainly must depend for its significance largely upon observation.¹² And accordingly it is hard to imagine a case in which the opinion of the witness could be of more real assistance to the jury.

RIGHT OF A DIRECTOR TO COMPETE WITH THE CORPORATION.—Though there is considerable diversity of judicial utterance concerning the nature of the fiduciary relation which a director bears to his corporation,¹ it is apparent that he must not use the funds under his control for his personal benefit. And it is but a short step from using the firm's assets to trading on its credit, or employing his official position for private gain by accepting remuneration for his vote as director. In each of these instances of breach of faith, the corporation, even though it has sustained no loss, can hold the miscreant official to a strict accounting for all his profits, or, if these have not yet accrued, can obtain a decree forcing him to hold his entire interest as trustee for the company.² Thus, when a corporation has concluded to make a certain purchase or contract, and a director, armed with the knowledge of this contemplated action, and before the corporation can move, secures for himself the desired property or contract, he will not be permitted to profit by it.³ When, however, he engages in a transaction that the corporation has not specifically contemplated, but which is nevertheless within the general field of that corporation's usual business, the solution is not so simple. This situation arose recently in *Jasper v. Appalachian Gas Co.* (Ky. 1913) 153 S. W. 50. Three of the directors of a gas producing company acting as individuals bought a franchise to supply gas in a city, and shortly thereafter sold this franchise to another corporation. A suit on behalf of the former company for an accounting for the profits of this transaction was unsuccessful. Some authorities, following the strict principles previously outlined, have thought that the director should be deemed a trustee for the profits of even such a transaction.⁴ And this accords with the early view that the personal existence of a director is practically merged in his official position, a view which found expression in tainting with voidability all contracts between one or more directors and the corporation.⁵ The same strict theory prevented an official from buying a corporate obligation from strangers at a discount and enforcing it at its face value.⁶ It was frequently

¹²*Trelawney v. Colman supra*; and see very strong dictum in *McKee v. Nelson* (N. Y. 1825) 4 Cow. 355.

¹*Elliott, Priv. Corp.*, § 502.

²*Machen, Corp.*, § 1607 *et seq*; 1 *Morawetz, Corp.*, (2nd ed.) §§ 517, 518. For a similar liability of others in a fiduciary relation, see *Van Horne v. Fonda* (N. Y. 1821) 5 Johns Ch. 388; *Goodhue F. W. Co. v. Davis* (1900) 81 Minn. 210; 1 *Perry, Trusts*, (6th ed.) §§ 427, 428 and notes.

³*Kroegher v. Calivada Colonization Co.* (1902) 119 Fed. 641; *DeBardeleben v. Bessemer Land Co.* (1903) 140 Ala. 621; *Acker Merrill & Condit Co. v. McGraw* (1907) 106 Md. 536.

⁴*Machen, Corp.*, § 1621.

⁵1 *Morawetz, Priv. Corp.*, (2nd ed.) § 517 *et seq*; 2 *Thompson, Corp.*, (2nd ed.) § 1223.

⁶*Hill v. Frazier* (1853) 22 Pa. 320; *Brewster v. Stratman* (1877) 4 Mo. App. 41.